IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
CRIMINAL DIVISION

Revised
Not Restricted
Suitable for Publication

Case No. CR-18-00216
Indictment No. H13172188

DIRECTOR OF PUBLIC PROSECUTIONS

v

TSEWANG SHERPA

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| JUDGE: | HIS HONOUR JUDGE PARRISH |
| WHERE HELD: | Melbourne |
| DATE OF HEARING: | 4 June 2018 |
| DATE OF SENTENCE: | 22 June 2018 |
| CASE MAY BE CITED AS: | Director of Public Prosecutions v Sherpa |
| MEDIUM NEUTRAL CITATION: | [2018] VCC 957 |

**REASONS FOR SENTENCE**

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| Subject: | CRIMINAL LAW |
| Catchwords: | Sentence – three charges of attempting to obtain financial advantage by deception; one charge of attempting to obtain financial advantage by deception |
| Legislation Cited: | *Crimes Act* 1958, s18; s231M and s82; *Sentencing Act* 1991, s6AAA; *Migration Act* 1958 (Cth) |
| Cases Cited: | *R v Howard* [2009] VSCA 281; *Saab v R* [2012] VSCA 165; *R v Dyer* [1999] VSCA 136; *Cameron v R* (2002) 209 CLR 339; *R v Pajic* (2009) 23 VR 527; *R v Verdins & Ors* (2007) 16 VR 269; *Guden v R* (2010) 28 VR 288; *Hat v R* (2011) 35 VR 109; *Director of Public Prosecutions v Najjar* [2009] VSCA 246; *Director of Public Prosecutions v Dimitrievski* [2016] VCC 1314; *Melnikas v R* [2016] VSCA 112; *Director of Public Prosecutions v Bulfin* [1998] 4 VR 114; *Dyason v R* [(2015) 251 A Crim R 336; *Director of Public Prosecutions (Vic) v O'Neill* (2015) 47 VR 395; *Nguyen v R* (2016) 261 A Crim R 1; *Phyllis v R* [2012] VSCA 140; *R v Kwon* [2005] NSWCCA 456; *Konamala v R* [2016] VSCA 48; *Da Costa v R* [2016] VSCA 49; *Boulton v R*; *Clements v R; Fitzgerald v R* (2014) 46 VR 308; *Phillips v R* [2012] VSCA 140; *R v Verdins; R v Buckley; R v Vo* (2007) 16 VR 269; *Schneider v R* [2016] VSCA 96; *R v Ralphs* [2004] VSCA 33 |
| Sentence: | Total effective sentence is three years two months (non-parole period of<br>two years). Compensation of at least $517,194.15 |

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| APPEARANCES: | Counsel | Solicitors |
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| For the DPP | Mr P Pickering | Solicitor for the Office of Public Prosecutions |
| For the Offender | Mr G Boaz | Dribbin & Brown |

HIS HONOUR:

1 Tsewang Sherpa, on 4 June 2018, you pleaded guilty to the following offences:

**Charge 1** – that you, at Docklands in Victoria between 5 February 2016 and 4 July 2016, dishonestly obtained for yourself or another a financial advantage, namely a credit to Westpac Bank account number 733009 760258 in the name of Kesh Bahadur Rana, in the sum of $11,679.35, by falsely representing to Medibank Private Limited that the claimant details, as described in Schedule A, were true and correct.

Obtaining financial advantage by deception is contrary to s.82(1) of the *Crimes Act* 1958 and carries a maximum penalty of ten years' imprisonment.

**Charge 2** – that you, at Docklands in Victoria between 31 March 2016 and 10 April 2016, dishonestly obtained for yourself or another a financial advantage, namely a credit to Commonwealth Bank account number 063203 10260266 in the name of Tsewang Donka Sherpa, the sum of $537.20, by falsely representing to Medibank Private Limited that the claimant details, as described in Schedule B, were true and correct.

The offence of obtaining financial advantage by deception is contrary to s.82(1) of the *Crimes Act* 1958 and carries a maximum penalty of ten years' imprisonment.

**Charge 3** – that you, at Docklands in Victoria between 1 April 2016 and 2 June 2017, dishonestly obtained for yourself or another a financial advantage, namely a credit to Commonwealth Bank account number 063203 10297894 in the name of Tsewang Donka Sherpa, the sum of $487,818.92, by falsely representing to Medibank Private Limited that the claimant details, as described in Schedule C, were true and correct.

The offence of obtaining financial advantage by deception is contrary to

s.82(1) of the *Crimes Act* 1958 and carries a maximum penalty of ten years' imprisonment.

**Charge 4** – that you, at Docklands in Victoria between 11 August 2016 and 2 June 2017, attempted to dishonestly obtain for yourself or another a financial advantage, namely a credit to Commonwealth Bank account number 063203 10297894 in the name of Tsewang Donka Sherpa, the sum of $24,939.75, by falsely representing to Medibank Private Limited that the claimant details, as described in Schedule C, were true and correct.

The offence of attempting to obtain financial advantage by deception is contrary to s.321M and s.82 of the *Crimes Act* 1958 and carries a maximum penalty of five years' imprisonment.

**The circumstances of the offending**

2 The prosecution has provided a document headed "Summary of Prosecution Opening", which provides a written summary of the circumstances surrounding your offending. Such summary has been marked as an exhibit (Exhibit 1) and has been accepted by you and your counsel as an appropriate representation of the offending. The important matters of such summary are:

- You are thirty-six years old, having been born on 16 June 1982. At the time of the offending, your age ranged between thirty-three to thirty-four years old. You are a citizen of Nepal and currently applying for Australian residency.

- On 9 June 2015, you commenced employment as a member advocacy consultant at Medibank Private Limited ("Medibank"). You were employed under the name "Tsewang Donka Sherpa" and were allocated an employee identification number, M47613. You also gave details of a Commonwealth bank account, being BSB 063-023 number 10260266, for the payment of your salary.

- On 30 November 2016, you transferred to the Overseas Student Health

Cover (“OSHC”) section of Medibank.

- On 6 February 2017, you transferred to the Service and Operations Team for the OHSC section of Medibank. Your duties included processing claims to members and providers, making claim adjustments and processing public health and email claims.

- As part of the Medibank claim processing system, each member is allocated a membership number and a personal identification number. This allows the member to access their claims online, with a user name and password. The member also has details recorded of their bank or credit card account for the debiting of premiums and an account for crediting of benefits paid. When a claim is processed on behalf of the member, the member receives an email, text, or written confirmation of the processing of the claim.

- Following a detection of irregularities in the payments and accounts managed by you, investigators from Medibank conducted an audit of those accounts which revealed: you had accessed the membership accounts of one hundred and forty three Medibank account holders using your authority as part of the service and operations team;

- the membership account holders were all overseas students;

- in each case you had changed a digit in a mobile phone number, or letter, or small part of an email address on the account, or a small detail in the mailing address, with the effect of such changes being that the computer system operated by Medibank was unable to send a text or email advising the member of a claim being made on the member’s behalf;

- you submitted one hundred and forty five false claims for services to Medibank using the altered account details;

- the total number of services claimed by you was five hundred and eight and a total of $517,194.15 was paid to you;

- Over the period from 31 March to 1 April 2016, two payments totalling $513.20 were paid to your Commonwealth bank account, BSB 063023 number 1026026, being the account into which your salary was paid (see Schedule “B” to the Indictment – Charge 2).

- Over the period from 5 February to 4 July 2016, ten payments totalling $11,697.35 were paid into a Westpac bank account, BSB 733009 number 760258, in the name of Kesh Bahadur Rana (see Schedule “A” to the Indictment – Charge 1).

- Between 1 April 2016 to 2 June 2017, one hundred and thirty three payments, totalling $487,818.92, was paid to your Commonwealth Bank Account, being BSB 063203 number 10297894, in the name of Tsewang Donka Sherpa (See schedule “C” to the Indictment – Charge 3).

- You also made a number of unsuccessful attempts to make false claims using the details of Medibank members. These attempts totalled $24,935.75 and occurred on 11 August 2016, 5 January 2017, 29 March 2017 and 2 June 2017. In each failed attempt, you attempted to have a false claim for benefits paid to your Commonwealth bank account BSB 063203 number 10297984 in the name of Tsewang Donka Sherpa (see Schedule “D” to the Indictment – Charge 4).

- On 5 June 2017, Medibank officials reported the matter to police for investigation and you were arrested on 7 June 2017.

- You participated in a taped Record of Interview at the Melbourne West Police Station on 7 June 2017 and generally made a “no comment” interview to the allegations of dishonesty, save that you admitted your identity, the fact that you were employed by Medibank and that you had

been dismissed following the meeting with your supervisors.

- Following your arrest and dismissal from your employment at Medibank, police executed a search warrant at the Medibank office at 727 Collins Street, Docklands on 7 July 2017, and later a further search warrant was executed on 20 July 2017 at the current home of Kesh Rana, the person named by you in your employment documents as an emergency contact, and also the person to whose account some of the moneys obtained by you were paid. The current location of Kesh Rana is unknown.

3 Counsel for the prosecution sought a forensic sample pursuant to s.464ZF(2) of the *Crimes Act* 1958, together with an order for compensation.

4 Counsel for the prosecution also noted that the filing was undertaken on 20 November 2017 and that you pleaded guilty to the offending at a committal mention on 31 January 2018.

5 Counsel for the prosecution confirmed that you have no criminal record and have spent no days in custody in relation to the subject offending.

**Victim Impact Statement**

6 Counsel for the prosecution tendered a Victim Impact Statement from Andrew James Hilliard who is an employee of Medibank and was the leading investigator investigating your offending. The statement was declared on 15 May 2018 and states, in part:

> "Medibank Private Limited (Medibank) has suffered a direct financial loss of $520,760.55 as a result of the fraudulent offending by SHERPA. This amount represents money that was diverted from Medibank bank accounts into bank accounts owned by or associated with SHERPA.
>
> Medibank has also incurred an additional $62,197.50 in fees for forensic services provided by KPMG. These forensic services related to the identification, capture, preservation and analysis of information relating to this matter.
>
> Numerous Medibank staff members have also been engaged in relation to the investigation, and Medibank has sustained the cost of their salaries as well as other missed opportunities. The value of the indirect costs incurred are estimated to be approximately $100,000.00."

7 Later in that document, it is stated that fraudulent claims against private health insurance funds increase the fund expenditure of a total benefit outlay and that this may ultimately have an impact on the premiums charged to all health insurance members which, in turn, may make private health insurance unaffordable to some families and individuals, resulting in a greater burden on the public health system.

**Your personal circumstances and background**

8 Your counsel tendered the following material:

(a) Outline of defence submissions dated 31 May 2018 (Exhibit "A");

(b) Psychological report of Ms Daria Sizenko, dated 30 May 2018, together with forensic psychological report of Dr Pamela Matthews, dated 30 May 2018 (Exhibit "B");

(c) A bundle of character references (five), including – one from Tenzin Lhaze, dated 14 May 2018; one from Tashi Gurung, dated 12 May 2018, one from Tsethar Tenzin, dated 13 May 2018; one from Lhakee Bhutia, dated 12 May 2018 and one from Pema Chenzum, dated 15 May 2018 (Exhibit "C").

9 Based on such material, and the various submissions made by your counsel, I note the following:

- You were born in Nepal, but grew up in Sikkim, being one of three children, with your older brother and his family continuing to live in Sikkim and your younger sister, with her family, now lives Bhutan.

- Although not sure of the age of your parents, you informed Dr Matthews that your mother retired in April 2018 (suggesting she was over the age of sixty-five years) and your father died on 21 September 2015 following a cardiac arrest.

- In particular, you informed Dr Matthews that you have had difficulty

coming to grips with the loss of your father and last saw him two years' prior to his death, when you were returning to Sikkim to plan your wedding in December 2015. You did not marry your partner until February 2017.

- Both your parents were government employees, with your mother working as a clerk and your father as a bus driver for a government department. You have "happy memories" of your childhood, although you noted that your parent's marital relationship was "strange" and sometime during the marriage an agreement had been reached with another man who would support the family financially in return for a relationship with your mother.

- You reported to Dr Matthews no developmental exposure to substance abuse, sexual abuse, or child abuse.

- You attended primary and high school in Sikkim, and after Year 9 you were sent to an English boarding school that had a good reputation and was located four to five hours away from the family home. When you were in Year 6 or 7, your mother moved to America to work, and in New York was working as a housemaid/cook/waitress, as well as doing laundry. During that time you and your siblings were raised by your father.

- You reported to Dr Matthews that during the time your mother was away you got into trouble in Sikkim focusing on your boyfriend rather than your studies and that your father would have found it difficult to control you. During this time, you ran off with your boyfriend, causing your mother to return from America and advising you that she would only approve of your relationship with your boyfriend if you both continued your studies, causing you to be sent to a further boarding school.

- You completed Year 12, with a 95 per cent average and obtained some

type of scholarship from the Tibetan government to study in Sikkim, at a small college, which was a three-day train trip from your home. At that time you completed the second year of a computer application degree, but unfortunately the college was shut down after you started your third year. During your studies you were working at a call centre in Bangalore, where you stayed for five years, which was a well-paid job which allowed you to give assistance to your family. You then left India for Nepal, where you worked as a teacher for a year, after which you and your sister came to Australia.

- In Australia, you commenced studying a Master's Degree in Information Technology through the Central Queensland University and your sister started working as a hairdresser. You and your sister lived in a share house in Sunbury and you also worked at a Chinese take-away shop part time while completing your degree.

- After graduating with the Master's degree you worked in an office job for Service Stream, working on scheduling installation jobs for Telstra, and was later promoted to the role of team leader. Unfortunately the job closed down and you used the redundancy package to pay for your sister's wedding to take her family on holiday in 2012 – this being the last time that you saw your father.

- On your return to Australia, you were unemployed for three months before finding a customer call service position with AGL, and you left there after about eighteen months, finding the work stressful. You then commenced work for yourself and started a cleaning business with your ex-boyfriend "Kesh", who you had met in the last semester of university and eventually grew closer, although the relationship was one based on friendship rather than romance. You lived together in an apartment in Brunswick until you met your present husband, Seth, who had come to Australia at the age of five.

- You moved with your partner, Seth, to Greensborough, where you lived with him and your in-laws, leaving the cleaning business to Kesh.

- After moving to Greensborough, you commenced working in an administrative role at Medibank, processing claims, and described that job as a "good working environment" and "kind of a dream job", and you were also confident in what you had to do. At that time, your husband was also employed working at National Australia Bank since graduating from university.

- Since being charged, you were unemployed for about six weeks and then your former employer, Service Stream, became aware you were available, and offered you work in the same position. You resumed work until January 2018, when you left to have your baby. Your child is a few months' old.

**Psychological evidence**

10 I refer to the report from Ms Daria Sizenko dated 30 May 2018 wherein she describes herself as a provisional psychologist supervised by the forensic psychologist, Ms Pamela Matthews.

11 Ms Sizenko notes that you were referred to her for treatment by your solicitor, and has attended four one-hourly sessions on 5 September 2017, 19 September 2017, 3 October 2017 and 7 February 2018. Sessions ceased at that time as you were unable to attend as you found it difficult to travel to the Melbourne CBD during your pregnancy.

12 Ms Sizenko noted that the sessions focussed on attempting to identify the factors and existing values contributing to the offending, developing an awareness of thoughts, feelings; and behaviours, allowing for a better understanding of self; developing strategies for coping with stress and emotions and self-regulation. Ms Sizenko notes that you were introduced to cognitive behavioural therapy as well as mindfulness and grounding

techniques.

13 In particular, Ms Sizenko states:

> "Ms Sherpa was able to identify her desire to fulfil her mother's expectations of her by financially supporting her being a significant contributor to her offending. She, however, struggled to identify her thought process and reasoning regarding her offending behaviour. Ms Sherpa admitted that she 'should've thought of the consequences', later noting that she had never considered the possibility of her going to prison. She was initially resistant towards clinical intervention, finding it difficult to challenge her existing thoughts. She was able to later recognise the need for psychological assistance, but likely continues to struggle with understanding depression and mental health illness in general."

14 Ms Sizenko notes that due to the limited amount of sessions, it was difficult for her to assess how much progress you have made towards understanding your offending and adjusting your beliefs and behaviours. Ms Sizenko noted that you did express some "regret and remorse" towards your actions, stating:

> "Wish [I] never done this."

> "Feel sorry, feel like I betrayed them [referring to her employers]."

15 Ultimately, Ms Sizenko was of the view that you were likely to benefit from ongoing supportive psychological intervention.

16 In her report, the forensic psychologist, Ms Pamela Matthews, notes that she examined you on 21 August 2017 and 14 May 2018, and also has available various material relating to the charges and the treatment letter from Ms Sizenko.

17 Amongst other things, Dr Matthews obtained a history that you had never tried illicit drugs nor engaging in gambling behaviours and only drank alcohol occasionally when out.

18 Furthermore, Dr Matthews obtained a history that you were in good health during your pregnancy but the birth was difficult, as you suffered a postpartum infection. Although the infection has resolved, you reported you continue to

experience low-back and hip pain.

19 Dr Matthews had noted that you had been attending Ms Sizenko and also, that you had been referred to the Royal Women's Hospital for management of post-natal depression.

20 Dr Matthews noted that you have persistently presented with low mood and congruent affect, and you have stated that your mood is low most days with "a lot of regrets" but you are trying to focus on the positive and are not suicidal. Dr Matthews also noted that you were a coherent historian without indications of formal thought disorder or delusional content. Your speech was noted to be normal in pace, tone and production and cognition estimated to be average to high-averaged, based on reported education. Dr Matthews thought your "self-awareness" was limited.

21 In particular, Dr Matthews states:

> "Ms Sherpa expresses disappointment in herself for her behaviour, she acknowledges her actions are wrong, and takes full responsibility.
>
> There appears to be no cognitive, personality or mental state issues involved in Ms Sherpa's offending. The basis of Sherpa's offending appears to be mediated by background guilt associated with the impact of her difficult behaviour in early adolescence on her mother's and her family's financial life and a strong desire to now please and appease her mother. Hence there has been internal emotional pressure for Ms Sherpa to respond to the weight of primarily her mother's needs but also the needs of her extended family. That pressure has in the writer's view been increased by Ms Sherpa's father's death in that in his dying she has assumed, at least within her own internal world, responsibility for her family. Further cultural pressure to maintain social standing within her own family and that of her husband's family surrounding her wedding in early 2017, in the writer's view has also played a part.
>
> Regarding current mental state, Ms Sherpa currently presents mildly depressed reactive to her current legal situation and post the birth of her daughter approximately 12 weeks ago. Her symptoms being: low mood, poor sleep, ruminative thinking, and wishing she did not exist; would not meet the full diagnostic criterion for a Major Depressive Disorder as defined by DSM-5 but would meet the diagnostic criterion for an Adjustment Disorder with Depression as defined by DSM-5 in that her symptoms have developed in response to an identified stressor, which she finds distressing."
>
> (Emphasis added.)

22 Later, Dr Matthews notes that she considers that you will manage a custodial sentence but only if your baby is with you in custody. In the event that you are unable to have your baby with you, or there is a delay in doing so, your mood is likely to rapidly deteriorate and your capacity to cope in a custodial environment will be significantly undermined and such a situation would be extremely difficult for you to bear, making your time in custody quite onerous.

23 Subsequently to the plea, your Counsel notified the Court that your application to have your baby accompany you into custody upon sentence has now been approved. Such approval would seemingly allay any concerns of Dr Matthews.

**The various references**

24 I have read the references from your husband, Tsethar Tenzin; from your mother, Lhakee Bhutia; your sister, Pema Chenzum; your relative, Tashi Gurung, and your friend, Tenzin Lhaze. The flavour of such references is that you have been a hardworking person who has been conscious of supporting your family generally and your mother in particular since your father's death. Furthermore, several of your referees refer to your expression of regret and remorse in relation to your offending.

**Mitigating circumstances relied on by your Counsel**

25 It was submitted by your counsel that the following matters are relevant in mitigation of sentence:

(a) You pleaded guilty at the "earliest opportunity" and after having given a "no comment interview" you indicated to those acting for the prosecution your intention to plead guilty to the offending. Indeed, the first committal mention was adjourned for the express purpose of resolving this matter. As your counsel pointed out, no substantive hearing was held on the basis that the matter would be contested.

26 Your Counsel submitted that you deserve "the full discount" available for the utilitarian value of such plea, in that a case has been

avoided which would have been difficult to prosecute and, accordingly, the community has been saved significant time and expense. It was submitted that the discount for such a plea should be "substantial in nature". (Reference was made to *R v Howard* [2009] VSCA 281 at [16] per Nettle JA, cited with approval in *Saab v R* [2012] VSCA 165 at [30]; *R v Dyer* [1999] VSCA 136 at [17]; *Cameron v R* (2002) 209 CLR 339; *R v Pajic* (2009) 23 VR 527 at 532);

(b) You have no prior convictions for any type of offending and there has been no subsequent offending;

(c) You have demonstrated remorse, both in part by your plea of guilty and more particularly, your comments to both psychologists and some of the people who gave you a reference. Your Counsel submits that you are "genuinely remorseful for your conduct", as is made plain in those comments by your relatives and friends. He submitted that your prospects of rehabilitation are "extremely good";

(d) Your counsel concedes that immediate imprisonment is "inevitable" but submits that the so-called fifth principle enunciated in *R v Verdins & Ors* (2007) 16 VR 269 is enlivened, in that your Adjustment Disorder as diagnosed by Dr Matthews and your post-natal depression as spoken about by Dr Matthews, would weigh more heavily on you in prison than it would a person in normal health. The Court was informed that reports from those treating you for the post-natal depression at the Royal Women's Hospital were not forthcoming as the treating doctor would not provide a report unless "ordered by the Court";

(e) If you are sentenced to a period of imprisonment of more than twelve months, your visa will be cancelled pursuant to the operation of s.501(3A) of the *Migration Act* 1958 (Cth) and you would face the prospect of being deported after your incarceration has been completed.

In this sense it is to be noted that your husband and daughter are Australian citizens and to have this "hanging over" you is "another form of punishment". (Reference was made to *Guden v R* (2010) 28 VR 288 at [27]; *Hat v R* (2011) 35 VR 109 at [126]);

(f) That you and your husband are prepared to repay the $517,194.15 back to Medibank. Indeed, in his reference, your husband confirms that this is the stated intention of both of you. Although conceding that some of the monies stolen were for your personal use, your counsel submitted "much of the money" was directed to your mother and other family members to assist them, particularly so after the death of your father in 2015.

27 Subsequent to the plea, your Counsel has informed the Court that the Crown has seized bank accounts and a property interest as proceeds of crime and that the best estimate of the total amount is approximately $220,000. Your Counsel submits that such sum will be forfeited unless you or your husband seek to make a claim on those assets and that he has been instructed that neither you nor your husband seek to make such a claim.

28 Counsel referred to the following decisions which, so it was submitted, gave support to a sentencing disposition involving a combined sentence of imprisonment, followed by a community correction order:

(a) *Melnikas v R* [2016] VSCA 112, wherein the applicant had been sentenced to a term of imprisonment of eighteen months, followed by a community correction order for eighteen months involving 250 hours of unpaid community work. The applicant had pleaded guilty to six charges of theft from a community organisation over a five-year period involving a total sum of $209,000. The applicant appealed to the Court of Appeal on the basis that such sentence was "manifestly excessive". Leave to appeal was refused;

(b) *Director of Public Prosecutions v Najjar* [2009] VSCA 246 which involved Najjar pleading guilty to seven counts of theft over a period between January 2003 and July 2006 from his then employer, amounting to $806,745.40. Najjar was sentenced to two years and eight months' imprisonment with a non-parole period of fourteen months.

29 The Director of Public Prosecutions appealed such sentence on the basis that it was "manifestly inadequate" and although the sentence was ultimately described by the Court of Appeal as a "merciful one", the appeal was dismissed;

(c) *Director of Public Prosecutions v Dimitrievski* [2016] VCC 1314, a decision of this Court which involved Dimitrievski pleading guilty to five rolled up charges of theft from her employer, with a total sum stolen of $330,681.94. In that matter, Dimitrievski was sentenced to twenty-one months' imprisonment, followed by a two-year community correction order with community work hours on various conditions.

30 Your counsel also submitted that it is not clear that any order for the compensation of the monies stolen can include a claimed amount of $62,197.50, being fees incurred by Medibank in respect of forensic services provided by the accounting firm, KPMG, relating to the identification, capture, preservation and analysis of information relating to your criminal activities

**The response of the prosecution**

31 Counsel for the prosecution made the following submissions:

(a) That it is difficult to provide any comparative cases given circumstances are different in each case, but in any event, referred to *Melnikas v R* (*op cit*) and in particular, to paragraph [66] whereat the Court of Appeal (consisting of Redlich, Santamaria and Beach JJA, stated:

> "In our view, given the nature of the applicant's offending, and notwithstanding the significant mitigating factors which the sentencing judge took into account, the sentence imposed by the judge was clearly within the range of sentencing options available

> to her Honour. What has been said by this Court in *Bulfin* [[1998] 4 VR 114 at 131-2] and *Dyason* [(2015) 251 A Crim R 36 at [33]] about white collar offending of the present kind has application in this case. While, in oral argument, the applicant referred us to a number of recent decisions of this Court concerning sentences imposed in other theft and deception cases, these cases do not assist the applicant in showing that the sentence imposed upon her was manifestly excessive. These cases merely show that different sentences may be imposed in the myriad of different circumstances that face sentencing courts on a daily basis. When one looks at these sentences, however, there is no basis upon which it may be contended that, by comparison, the sentence imposed upon the applicant was outside the permissible range open to the judge."

(b) Counsel for the prosecution referred to *Dyason v R* (*op cit*) (which is referred to in the above quote from the Court of Appeal judgment of *Melnikas*) and in particular, to paragraphs [32]–[33], wherein the Court of Appeal (consisting of Whelan, Santamaria and Beach JJA) stated:

> "In *Bulfin* this court considered a sentencing appeal from an offender who had pleaded guilty to a variety of offences involving fraud and deception concerning public investments of many millions of dollars. The offender pleaded guilty early, was remorseful, co-operated with authorities and agreed to give evidence against other accused, and was otherwise a person of good character. A submission was made on behalf of the offender on the sentencing appeal that in 'white collar cases' there should be a 'wider than normal gap' between the head sentence and the non-parole period.
>
> Charles JA, with whom Winneke P and Callaway JA relevantly agreed, rejected that submission. He referred to the fact that white collar offenders usually had no prior criminal history and that the prospects of rehabilitation of such offenders were generally very high. He observed that specific deterrence would often not feature largely in the sentencing consideration. He said, however, that these features had a tendency to distract attention from the importance of general deterrence. Charles JA then said the following:
>
> > 'The motivation to engage in conduct of the kind here under consideration may spring from many sources: a position of trust and the easy ability to abuse it; the enormous rewards that may be available; a position of high authority in some substantial enterprise and the offender's assumption that discovery or proof of wrongdoing can be avoided; greed or the burden of funding an extravagant lifestyle; weakness in succumbing to outside pressures to use deceitful means for business ends; and personal or corporate ambition, to name but a few. Whatever the motivation, offences of the kind here in question almost invariably involve a carefully calculated course of conduct over a long period, repeated deliberate acts of dishonesty, substantial amounts of money, and, frequently, losses (often tragic in their impact) to large numbers of small investors. The offender often

> holds a position making it possible, or has the ability, to disguise or camouflage the conduct in question. Detection is difficult, the investigation of the crime usually lengthy and very expensive, and the problems of trial and proof will frequently be extreme. Many of these matters were discussed by this court, similarly constituted, in *R v Kostikidis and Mpehelevanas* (unreported, Court of Appeal, 12 September 1996) … . The result of such considerations, in my view, is that the element of general deterrence will usually carry particular significance in sentencing for crimes such as the present, both in relation to the total effective sentence and the non-parole period; together with a requirement for strong denunciation by the sentencing court.
>
> For persons first contemplating corporate criminality, a sentence which requires an offender to spend a substantial term in actual custody by virtue of the non-parole period fixed, is, in my view, much more likely to focus their attention and have real deterrent impact than a longer head sentence, much of which is likely to be served on parole after the offender's release from custody. If this view be correct, to fix an unduly short non-parole period, would, in cases such as the present, be quite subversive of the whole concept of general deterrence, notwithstanding that a significantly longer head sentence was imposed. … .'"

(c) Counsel for the prosecution stressed that it would appear that but for the detection, the offending would not have stopped – in this respect, the last two offences occurred on 2 June 2017, some three days before detection on 5 June 2017;

(d) Counsel for the prosecution noted that all bank records that had been available to the defence would suggest that there were large withdrawals of cash from your bank accounts but it is unclear whether they were for personal items or to be transferred overseas for the benefit of your mother and other members of your family. In this respect, counsel for the prosecution highlighted that the summaries in the KPGM report referred to various moneys being used for "lifestyle" purposes;

(e) In respect of the submission made by your counsel to the enlivening of principle 5 set out in *Verdins* (*op cit*), counsel for the prosecution referred to the decision of *Director of Public Prosecutions (Vic) v O'Neill* (2015) 47 VR 395, and in particular, to paragraph [71], wherein the Court of Appeal (consisting of Warren CJ, Redlich and Kaye JJA) stated, in relation to the principles set out in *Verdins*, that:

> "First, the principles are enlivened only where the offender suffers from an impairment of mental functioning. Whether there should be any moderation of general deterrence, and if so its degree, will depend upon the nature and severity of the impairment of mental functioning. It is important to keep in mind that, in *Verdins*, and in this court's subsequent application of *Verdins*, the court has consistently stated that the principles in *Verdins* relate to offenders who suffered from 'mental impairment' or 'impaired mental functioning', whether at the time of the offending or at the time of sentence. While the court in *Verdins* regarded the particular diagnostic label as not being determinative, the principles expressed have always been confined to cases in which the offender suffered an impairment of his or her mental functioning. They do not apply to personality disorders such as those from which the respondent suffered."

32 It was submitted that the diagnosis of Dr Matthews was "vague" and "marginal" and is of a limited disorder at best. Furthermore, the condition appeared to be a response to your current legal situation;

(f) Counsel for the prosecution accepted that being separated from your child would add to your hardship during prison but it is difficult to act on any allegation of post-natal depression as it is only an assertion and there is no evidence before the Court;

(g) Counsel for the prosecution, in relation to the submission made about your potential deportation, referred to *Nguyen v R* (2016) 261 A Crim R 1 in which, it was submitted, sets out the relevant considerations.

33 Ultimately, counsel for the prosecution submitted that immediate imprisonment with a non-parole period is appropriate. In this respect, it was also accepted by counsel for the prosecution that your plea of guilty should be considered to be an early plea for the purposes of s.6AAA of the *Sentencing Act* 1991.

**Conclusion**

34 You have pleaded guilty to three charges of dishonestly obtaining a financial advantage and one charge of attempting to obtain a financial advantage. I consider your offending to be of a serious nature.

35 Not only is the sum which you illegally obtained from your employer a significant amount, to wit, $520,760.55, such offending occurred over a period

of approximately sixteen months and only came to an end when your activities were detected.

36 Although not an overly sophisticated scheme, you used your skills obtained in the use of information technology, and the position which you had with Medibank, to interfere with the storing of various information relating to the processing of claims and premiums in relation to overseas students. In effect, you created 508 services claimed by alleged members, which resulted in various sums being reimbursed into your account or other nominated accounts.

37 As asserted by Mr Andrew Hilliard, an employee of Medibank, in his victim impact statement such fraudulent claims against private health insurance funds increased the fund expenditure of a total benefit outlay, which may ultimately have an impact on the premiums charged to all health insurance members, which in turn may make private health insurance potentially unaffordable for some, resulting in a greater burden on the public health system.

38 I do consider that such offending demonstrated a gross breach of trust on your part to your employer, and the offending was sustained, frequent and ongoing over the sixteen months or so.

39 You assert that much of the money fraudulently obtained was spent on assisting your family, in particular your mother, since the death of your father in 2015. It is not clear how much money was sent to your mother in India but there are various documents found by the investigating accountants, KPMG, which would suggest moneys were spent on your own comfort.

40 It is suggested by the psychologist, Dr Matthews, that your offending appears to be mediated by a background guilt associated with the impact of your difficult behaviour in early adolescence, causing strain on your parents' financial situation and also a strong desire to now please and appease your

mother. Some support is obtained for such proposition when one reads the references which generally assert that you are very generous to your family and in particular, your mother. None of the money has been recovered, although I note that your husband and you have asserted that the money will be repaid.

41 I also note that you have informed the Court, through your counsel, that you and your husband do not intend to make any claim on assets now held by the Crown as proceeds of crime, and that the best estimate of such assets is approximately $220,000.

42 I have been since informed that the net sum of assets held by the Crown as proceeds of crime is approximately $181,000 at which you or your husband will make no claim. In that event, the Crown would reimburse Medibank to that extent. Of course, all of this has to come to pass. However, I do accept that such indication by you is some indication of your remorse and your intention to reimburse Medibank.

43 Hitherto this offending, your record would suggest that you have been an ambitious woman who has worked your way through tertiary education, looking for a better future for yourself and, indirectly, your family. I accept that it is probably one of the major motives for your dishonesty was to obtain monies for your family and, in particular, your mother, but also consider that monies were spent for your own personal use.

44 In mitigation, I do accept that your pleas of guilty to these offences were at an early time and had the utilitarian effect of saving the Court the time and cost of a trial, as is made clear by *Phillips v R* [2012] VSCA 140 at paragraph [36].

45 It is always a question for the sentencing judge whether remorse or a willingness to facilitate the course of justice and an acceptance of responsibility are to be inferred from a plea of guilty (see again *Phillips v R* (*op cit*) at paragraph [96]). I consider that, ultimately, the evidence against you in

this matter was very strong, but do accept that your early plea of guilty is some evidence of remorse.

46 It was submitted by your counsel that you are "genuinely remorseful for your conduct" and reference was made to various comments set out in the references from your friends and relatives. However, I note the comments of the provisional psychologist, Ms Daria Sizenko, who, after four sessions with you leading up to 7 February 2018 (when you ceased because of your pregnancy), was of the view that it was difficult to assess how much progress you had made towards understanding your offending and adjusting your beliefs and behaviours, although she does note that you expressed some "regret and remorse".

47 Although I accept that you have expressed remorse, I doubt that you have a clear understanding of the nature and extent of your offending. In this sense, I consider that your prospects of rehabilitation are only reasonable.

48 I also accept that you have no prior convictions of any type of offending.

49 Your counsel relies on the fifth principle enunciated in *R v Verdins; R v Buckley; (op cit)* that imprisonment will weigh more heavily on you than it would a person in normal health given your Postnatal Depression, as recorded by Dr Matthews and, indeed, the Adjustment Disorder, as diagnosed by Dr Matthews. The only evidence before me in relation to the Postnatal Depression was that you had been referred to the Women's Royal Hospital for management of that condition. There is no reportage from the Women's Royal Hospital – apparently on the basis that a doctor would not provide a report unless subpoenaed to do so.

50 I also refer to *Director of Prosecutions v O'Neill* (*op cit*) and, in particular, to paragraphs [76]–[78], wherein the Court of Appeal stated:

> "Fourth, the fifth and sixth limbs of *Verdins* may operate where the existing impairment will make prison more onerous, or where prison may exacerbate the mental condition, if the expert evidence establishes the

> significance of the impairment to the imposition of a prison sentence.
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> Fifth, cogent evidence, normally in the form of an expert opinion, is necessary to establish the existence of the mental impairment, either at the time of the offence, or at sentence, or both, and the nature, extent and effect of the mental impairment experienced by the offender at the relevant time.
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> Sixth, the assessment by the sentencing judge must be undertaken with rigour, as was made clear in *Verdins* itself and has since been repeatedly emphasised by this court on appeal."
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> (Footnotes omitted.)

51 There is no direct evidence before me that you suffer from Postnatal Depression. Furthermore, as I have already recorded, I have been informed by your representatives that you are permitted to have your child in prison. In all the circumstances, I do not take this aspect into account as a mitigating factor within the context of Principle 5 of the *Verdins*' principles.

52 However, Dr Matthews diagnosed you to be "mildly depressed" which, although not satisfying the diagnostic criteria for Major Depressive Disorder, could satisfy the diagnostic criteria for an "Adjustment Disorder with Depression". She noted that such condition seems to have been reactive to both your current legal situation and post the birth of your daughter.

53 Although I consider that based on the evidence of Dr Matthews, such condition is not particularly acute, I do accept, in general terms, that any term of incarceration will weigh more heavily on you than it would with a person in normal health.

54 In relation to the deportation issue, I refer to the recent cases of *Konamala v R* [2016] VSCA 48*; Da Costa Jnr v R* [2016] VSCA 49; *Schneider v R* [2016] VSCA 76 and *Nguyen v R* (2016) 261 A Crim R 1, all of which post-dated *Guden v R* (*op cit*). In particular, the *Migration Act* 1958 changed in 2014 in that after that date a person holding a visa, such as the visa held by you, will have that visa revoked if, among other things, sentenced to a term of imprisonment of twelve months or more.

55 There are remedies open to such people to overturn such revocation in the legislation. At the time of *Guden v R* (*op cit*) was decided, the prospect of deportation was a discretionary decision made by the Minister of Immigration. Under the present regime, it is a matter of speculation as to what a responsible Minister may or may not do when an application for revocation is made following any automatic cancellation decision (see *Nguyen v R* (*op cit*) at paragraph [52]).

56 I refer to *Konamala v R* (*op cit*) at paragraphs [34]–[37], wherein the Court of Appeal (consisting of Maxwell P, Redlich and Priest JJA) stated:

> "Self-evidently, whether the prospect of deportation in a given case will make the burden of imprisonment more onerous will depend on the prisoner's personal circumstances. It is an unhappy fact that many offenders come to this country for the sole purpose of criminal activity. They have no interest in making Australia their home. For offenders such as those, deportation to their country of origin may impose no burden upon them at all. Indeed, deportation might be something of a blessing, particularly where language or culture have caused them to be isolated. On the other hand, the prospect of deportation might be a severe additional punishment for an offender who had aspired to make Australia his or her home, particularly if the offender has a spouse, children or other family resident in the country, or has other ties to the Australian community.
>
> > In *Guden*, it was recognised that — subject always to the state of the evidence before the sentencing judge — the prospect of deportation is a proper matter for consideration in determining an appropriate sentence. Despite the changes to the Act, that must remain so. Without evidence bearing on the issue, although it may be said with some confidence that the visa of an offender in the applicant's position will be cancelled, it cannot be assumed that the Minister will not revoke the original decision to do so.
> >
> > For the reasons given in *Lima Da Costa Jnr v R*, the amendments do not require any change to the approach in sentencing. What was said in *Guden* still applies. It is apparent that the judge directed herself correctly in considering the significance of the risk of deportation.
> >
> > As already mentioned, the judge said that she considered that 'there is the possibility that [the applicant] may lose the opportunity of settling permanently in Australia', and that there 'is a degree of risk that [his] concern and fear of being deported upon serving [his] sentence will make [his] imprisonment more burdensome than it would have otherwise'. The sentencing judge said specifically that she had 'taken these factors into account'."
>
> (Footnotes omitted.)

57 Counsel for the prosecution ultimately submitted that the authorities stand for

the proposition that, subject to the state of the evidence, an offender's period of incarceration would be more burdensome given the uncertainty as to what a revocation of any visa may lead to. The evidence in this matter is that you are a Nepalese woman married to an Australian citizen (formerly from Nepal) and have given birth to a child born in Australia. In the circumstances of this matter, I accept and take into account that any period of incarceration of twelve months or greater would be more burdensome, given the uncertainty of whether deportation will follow after your release from prison.

58 I consider that the Court should have regard to the following sentencing principles of just punishment, denunciation, general deterrence and specific deterrence. Given the nature of this offending, which, as was stated in *Melnikas v R* (*op cit*), is frequently hard to detect and hard to follow the accounting trails, and frequently committed by those who have no criminal record, general deterrence in particular, is an important sentencing consideration (see also generally *R v Ralphs* [2004] VSCA 33 at paragraph [14]).

59 I have given consideration to the guideline judgment given by the Court of Appeal in *Boulton v R*; *Clements v R; Fitzgerald v R* (2014) 46 VR 308 pertaining to the operation of community correction orders which have been available in Victorian courts since January 2012.

60 Such considerations involve an assessment of the objective nature and gravity of your offending and moral culpability. As I have already recorded, I consider your offending to be of a serious nature and your moral culpability significant given the nature of such offending.

61 I have reached the opinion that the offending, as so assessed, is so serious that nothing short of an immediate sentence of imprisonment will suffice to satisfy the requirements of an appropriate sentence.

62 Counsel raised with me whether or not in relation to any compensation order

under s.86 of the *Sentencing Act* should extend to the sum of moneys incurred by Medibank paying KPMG for their forensic services. After discussion today, I reserve that question for further debate.

63 Please be upstanding.

64 (a) In relation to Charge 1, you are convicted and sentenced to five months' imprisonment;

65 (b) In relation to Charge 2, you are convicted and sentenced to one month's imprisonment;

66 (c) In relation to Charge 3, you are convicted and sentenced to thirty-four months' imprisonment. The sentence imposed on this charge will be the base sentence;

67 (d) In relation to Charge 4, you are convicted and sentenced to five months' imprisonment;

68 (e) I direct that two months of the sentence imposed on Charge 1 and two months of the sentence imposed on Charge 4 be served cumulatively upon each other and upon the sentence imposed in Charge 3. The sentence imposed on Charge 2 will be served concurrently with the other sentences.

69 The total effective sentence is three years two months and I direct that there be a non-parole period of two years;

70 (f) The Court orders that you are to pay Medibank compensation in the sum of at least $517,194.15, being the amounts of the thefts committed by you. As stated, I reserve the issue as to whether or not that should be added to by the KPMG amounts;

71 (h) I will grant the order sought that a forensic sample be taken pursuant to s.464ZF(2) of the *Crimes Act* 1958;

72 (i) I further declare that pursuant to s.6AAA of the *Sentencing Act* 1991, save for your pleas of guilty, I would have imposed a sentence of five years' imprisonment.

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82 Anything to say? Have you checked the arithmetic?

83 MR PICKERING: Yes, Your Honour. It is good, Your Honour.

84 HIS HONOUR: Well are we left on the basis then the order has been made for that compensation, if I call it, the criminal aspect of it. Will I be contacted if there is going to be further argument?

85 MR PICKERING: Yes, Your Honour, I will liaise with my learned friend as to what submissions he may or may not wish to make and my instructor will speak to the confiscations section at the OPP as to the whether we wish to take it any further.

86 HIS HONOUR: Yes, I spent a fair bit of the weekend researching it. I found things which may be of assistance, but I was amazed, there does not seem to

be anything, or I could not find anything at least that was spot on and coming from a civil background, there is issues about economic loss from a tort. I know this is a completely different thing but there are limits as to where you can go but as I said in my initial comments, it is not free of difficulty. I just was not comfortable making the order at this stage.

87 MR PICKERING: If Your Honour pleases and that matter can simply be listed at a later date if required but otherwise, we will both take instructions.

88 HIS HONOUR: Yes. I will allow the husband to just say something to his wife because there is no facilities for that downstairs, is there?

89 DR BOAS: No, Your Honour.

90 HIS HONOUR: Mr Sherpa, if you just want to approach your wife briefly, you can. I will allow that, ladies and gentlemen. Yes, I think that is fine, thank you. Take the prisoner down, thank you.

91 (Prisoner removed.)

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